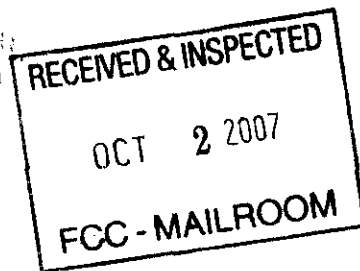


Before the  
Federal Communications Commission  
Washington, D.C. 20554



In the Matter of )  
Service Rules for Advanced Wireless Services )  
in the 2155-2175 MHz Band )  
)  
)  
)

WT Docket No. 07-195

FCC 07-164

To: The Commission  
Marlene Dortch, Secretary

**MOTION OF M2Z NETWORKS, INC.  
TO STAY OUTCOME OF NPRM PENDING M2Z'S ADMINISTRATIVE APPEAL**

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Pursuant to 47 C.F.R. § 1.43, M2Z Networks Inc. ("M2Z") respectfully requests (1) that the Federal Communications Commission ("Commission") stay the outcome of the Notice of Proposed Rulemaking styled *In the Matter of Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band*, WT Docket No. 07-195 (released September 19, 2007) ("NPRM") until the resolution of M2Z's appeal from a related Commission Order,<sup>1</sup> which is currently pending in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") and (2) that the Commission join M2Z in requesting that the D.C. Circuit expedite the appeal. As shown below, a stay is warranted here because the four traditional stay factors – irreparable harm, likelihood of success on the merits, prejudice to other parties, and the public interest – all cut sharply in favor of ensuring that the NPRM does not run its course before M2Z's appeal does. The "irreparable harm" issue is especially compelling: if the Commission were to issue rules in this docket before M2Z's appeal

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<sup>1</sup> See *In the Matter of Applications for License and Authority to Operate in the 2155-2175 MHz Band, Petitions for Forbearance Under 47 U.S.C. § 160*, WT Docket Nos. 07-16 & 07-30, Order, FCC 07-161 (released Aug. 31, 2007) ("Order").

has been decided it could potentially strip the D.C. Circuit of jurisdiction to hear and rule upon the appeal by rendering such appeal moot.

In light of the Commission's stated intent to issue rules in this docket within nine months, M2Z must respectfully request this stay in order to avoid any possibility that a rulemaking decision will frustrate M2Z's exercise of its appellate rights. Furthermore, because M2Z plans to seek timely relief in the D.C. Circuit should the Commission decide not to impose the requested stay, M2Z respectfully requests that the Commission rule on this stay request by Tuesday, October 9, 2007. If the Commission has not ruled by then, M2Z will file a stay request seeking the same relief in the D.C. Circuit in order to protect its rights. Motions affecting the calendaring of the appeal are due on October 15, 2007; therefore, M2Z must and will seek expedition and/or file a stay request by that date.

M2Z has concluded with some reluctance that this filing is necessary. M2Z continues to believe that a swift and timely determination as to the highest and best use of the spectrum is in the public interest. M2Z seeks this stay only in order to ensure harmonization of the Commission's decisional timetable with the Court's, in a way that accords due respect for the Court's jurisdiction over the pending appeal. Additionally, and in accordance with the above, M2Z respectfully requests the Commission to join M2Z in requesting that the D.C. Circuit expedite the appeal to ensure a swift and timely determination as to the highest and best use of the spectrum.

## **I. BACKGROUND**

On August 31, 2007, the Commission released an Order styled *In the Matter of Applications for License and Authority to Operate in the 2155-2175 MHz Band, Petitions for Forbearance Under 47 U.S.C. § 160*, WT Docket Nos. 07-16 & 07-30, Order, FCC 07-161 (released Aug. 31, 2007) ("Order"). The Order dismissed without prejudice M2Z's application for a 15-year license to

provide free, family-friendly nationwide broadband service in the 2155-2175 MHz band. *See* Order at ¶ 9. The Order also rejected certain requests for forbearance that M2Z had filed concomitant to its license application. *See id.* at ¶ 10.

On September 11, 2007, M2Z filed in the D.C. Circuit a Notice of Appeal from the Order. However, on September 19, 2007 – well before briefing in M2Z’s appeal could even begin – the Commission released its NPRM announcing its commitment to issue service rules for the AWS-3 band within nine months from the date of the NPRM’s publication in the Federal Register. NPRM ¶ 4. As explained below, those service rules could moot M2Z’s pending appeal before the D.C. Circuit.

## **II. ARGUMENT**

While the Commission’s effort to promulgate rules for service in the AWS-3 band is commendable, issuance of such rules prior to the D.C. Circuit’s resolution of M2Z’s pending appeal would violate M2Z’s constitutional rights, and rights under the Communications Act and Administrative Procedure Act, by short-circuiting the appeals process. Although the Commission might ultimately adopt rules acceptable to M2Z, M2Z’s right to appellate review of the order cannot and should not be frustrated based on a possible outcome of the NPRM process. Furthermore, as explained below, the other preliminary-injunction factors militate in favor of a stay. M2Z therefore respectfully requests that such a stay be entered.

M2Z emphasizes that the stay it seeks would not prevent the Commission from continuing to accept and consider comments, reply comments and other filings and communications, and issue interim procedural orders with regard to the rulemaking process in the above-captioned docket. A stay would simply ensure that no substantive rules are issued prior to the resolution of M2Z’s D.C. Circuit appeal. As such, the stay likely would not slow the Commission’s rulemaking process. In

order to ensure that this is so, M2Z further respectfully requests that the Commission join M2Z in asking the D.C. Circuit to expedite its handling of M2Z's pending appeal. We believe that the requested stay, and a joint motion to expedite would allow for the orderly disposition of these interrelated matters and would be in the best interest of the Commission, M2Z, and the public.

**A. A Stay Is Appropriate Under The Applicable Four-Factor Test.**

"To receive a stay of an administrative action, a party must show that: (1) it will suffer irreparable harm if the stay is not granted, (2) it is likely to prevail on the merits of its appeal, (3) the grant of a stay will not harm other interested parties, and (4) the grant would serve the public interest." *In re Cambridge Partners, Inc.*, 15 FCC Red 17901, 17902, ¶ 4 (2000); *see also Washington Metro. Area Transit*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). No precise quantum of likely success on the merits need be shown; instead, the required showing grows less demanding as the degree of irreparable harm becomes more severe. *See Washington Metro Area Transit*, 559 F.2d at 844. Stated another way, if "the balance of hardships tips sharply" in favor of a litigant in terms of irreparable harm, it is enough for that litigant to show that "serious questions are raised" in the appeal. *Id.*

Application of this test demonstrates that the Commission should stay the outcome of the above-captioned NPRM pending completion of M2Z's pending appeal.

1. *Irreparable Harm.* The Commission's NPRM will directly and irreparably harm M2Z by potentially vitiating M2Z's pending claims. That is so for two reasons.

First, two of the spectrum use proposals considered by the Commission in the NPRM are utterly inconsistent with M2Z's proposed use of the 2155-2175 MHz band and therefore would preclude M2Z's use of the spectrum if adopted. In addition, a third proposal, the "structured

uplink/downlink use”<sup>2</sup> approach, would severely limit the capacity and viability of M2Z’s proposed service.

The first of these proposed methods is “a downlink approach”<sup>3</sup> that “would prohibit mobile transmissions”<sup>4</sup> in the 2155-2175 MHz band and require the licensee to “combin[e] this spectrum with other available base- and mobile-transmit spectrum bands and utilize asymmetric pairing.”<sup>5</sup> In other words, the Commission proposes to assign or otherwise designate the spectrum in a manner that unambiguously favors incumbent AWS licensees<sup>6</sup> and precludes novel and innovative proposals that advance the stated public policy goals of both the Commission and the United States Congress.<sup>7</sup> The adoption of such a rule would prevent M2Z from pursuing its business plan for use of 2155-2175 MHz because it would not allow M2Z to offer two-way (base and mobile) transmissions in the band.

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<sup>2</sup> NPRM Section 4.A.2.

<sup>3</sup> NPRM ¶ 21.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Several years ago, a number of incumbent interests sought the asymmetric pairing of the 2155-2175 MHz band with the 2110-2155 MHz band and the 2175-2180 MHz band. *See* AT&T Wireless Reply Comments at 7 (filed April 28, 2003); Verizon Wireless Comments at 2, 7 (filed April 14, 2003); Motorola Comments at 1 (filed July 20, 2004); CTIA Comments at 6 (filed April 14, 2003); Cingular Comments to the *AWS Allocation Third NPRM*, at 6, 9-10 (filed April 14, 2003). At the time of the filings, there were no AWS licensees within the 2.1GHz band. Thus, an asymmetric pairing would be available to any interested party. That is no longer the case. Last year, the Commission auctioned off the 2110-2155 MHz band. *See Auction of Advanced Wireless Services Closes: Winning Bidders Announced for Auction 66*, Report No. AUC-06-66-F, Public Notice, 21 FCC Rcd 10521 (WTB 2006). While, in theory, carriers other than the AWS-1 licensees may be able to benefit from an asymmetric pairing of the 2155-2175 MHz band, it is notable that every party that has previously requested an asymmetric pairing of the 2155-2175 MHz band proposed that such a pairing occur with 2110-2155. That is because the AWS-1 licensees are the only parties that would likely be able to develop equipment to benefit from such a decision. Even if other carriers were able to benefit from such an asymmetric pairing, it would only be available to parties that already have spectrum assets and would shut out new entrants like M2Z.

<sup>7</sup> *See generally* 47 U.S.C. § 151 (2007); 47 U.S.C. § 157 nt. Pub L. No. 104-104, § 706(a), 110 Stat. 153 (1996); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, MB Docket No. 05-311 ¶ 62 (rel. March 5, 2007) (citing 47 U.S.C. § 157 nt.); FCC 2006 – 2011 Strategic Plan at 5, *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-261434A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261434A1.pdf) (last visited Sept. 24, 2007); *see also* 47 U.S.C. § 309(j)(3).

The second proposed approach is “an unlicensed regime”<sup>8</sup> that, by definition, would be prejudicial to M2Z’s application and petition for forbearance. The re-designation or reallocation of the spectrum as an unlicensed band would frustrate M2Z’s plans for a nationwide free broadband service by withholding interference protection and exclusive use rights (and its associated quality of service benefits) from operators in the band, making it much more difficult to relocate current band users to other bands and making it extremely unlikely (due to the lower transmit power generally associated with unlicensed use) that band operators would be able to achieve the wide area coverage that consumers have come to expect from providers of wireless services.

Finally, the proposed “structured uplink/downlink use”<sup>9</sup> approach would “allow for mobile-plus-base transmit operations”<sup>10</sup> in the middle 10 MHz of the band while limiting the “upper and lower five-megahertz blocks of the band”<sup>11</sup> to “fixed or base transmit-only operations.”<sup>12</sup> The implementation of this proposal would severely impair M2Z’s ability to provide its proposed services—even if it could obtain the smaller amount of spectrum in which mobile and base transmissions would be allowed—by reducing significantly the efficiency with which M2Z could use its licensed spectrum resources, which would result in M2Z being much more vulnerable to network capacity limitations than would be the case if it were allowed to use the entire band for both mobile and base transmissions. M2Z’s application contemplates both mobile and base transmissions throughout the band because of the inherent efficiency of such a regime. Thus, the structured uplink/downlink proposal would still prevent M2Z from realizing the full benefits sought in its application and forbearance requests without meaningful judicial review of the Order denying

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<sup>8</sup> NPRM ¶ 95.

<sup>9</sup> NPRM ¶ 19.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*



such requests. The structured uplink/downlink proposal as well as the downlink and unlicensed proposals discussed above run contrary to the express terms of Appendix 2 of M2Z's license application which details the technical parameters of M2Z's proposed service (as derived from the Commission's Broadband Radio Service rules).<sup>13</sup> Indeed, the interference issues for which the Commission seeks comment throughout the NPRM were comprehensively addressed by M2Z in the two dockets established for review of its application and forbearance petition.<sup>14</sup>

Second, even if the Commission were to adopt rules that did not explicitly or implicitly prevent M2Z from obtaining and utilizing the spectrum, M2Z's appeal may potentially be mooted if the Commission decided to assign the spectrum by utilizing an auction process – an approach that the Commission has indicated it favors.<sup>15</sup> Adoption of such a process would by necessary implication mean rejection of M2Z's application, which sought grant of a license without an auction based on the requirements of Section 309(j)(6)(E).<sup>16</sup> It also could potentially prevent the court from deciding an important subsidiary question – whether the Commission was wrong to favor an auction framework in the first place.

The rules that emerge from the NPRM, in short, pose a serious threat of short-circuiting M2Z's pending appeal – and the important issues it presents. In view of these grave procedural

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<sup>13</sup> See M2Z Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band, Appendix 2 (filed May 5, 2006).

<sup>12</sup> See M2Z Application at 19-21 & Appendix 2; M2Z Forbearance Petition at 41 (filed Sept. 1, 2006); M2Z Consolidated Opposition to Petitions to Deny at 88-98, WT Dockets 07-16 & 07-30 (filed Mar. 29, 2007); M2Z Reply Comments at 27-29, WT Dockets 07-16 & 07-30 (filed Apr. 3, 2007); M2Z Ex Parte Response to Replies and Oppositions at 22-26, WT Dockets 07-16 & 07-30 (filed Apr. 16, 2007).

<sup>15</sup> See generally NPRM Section IV.C.

<sup>16</sup> 47 U.S.C. § 309(j)(6)(E) (2007) (providing in relevant part: “[n]othing in this subsection, or in the use of competitive bidding, shall-- \* \* \* (E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings”).

harms, the Commission should stay the outcome of its rulemaking until the D.C. Circuit has ruled on the merits of M2Z's appeal.

2. *Likelihood of Success.* M2Z is likely to succeed on the merits of its appeal to the D.C. Circuit because the Commission committed a number of legal errors in its Order. For one, the Commission failed to adequately consider both M2Z's application and petition for forbearance. As the Commission noted in the NPRM, "[w]e recently dismissed all pending applications for operation in this band, determining that the public interest would best be served by initiating this rulemaking process."<sup>17</sup> But the D.C. Circuit has previously ruled that the Commission may not deny a forbearance petition "on the grounds that an alternative route for seeking regulatory relief was available."<sup>18</sup> Moreover, in concluding that forbearance was not in the public interest, and on that basis denying M2Z's petition for forbearance, the Commission, in violation of 47 U.S.C. § 160(b), failed adequately to consider – indeed, failed to consider at all – whether forbearance would promote competitive market conditions, including the extent to which forbearance would enhance competition among telecommunications service providers.

These are only a few of the many well-grounded assignments of error M2Z has raised in the D.C. Circuit. The Commission also: (1) violated 47 U.S.C. § 160(a)-(c) by failing to make a substantive decision on whether granting M2Z's petition for forbearance would be in the public interest; (2) rested its Order in part on a legally erroneous predisposition to award spectrum through a competitive bidding process, in violation of 47 U.S.C. §§ 309(j)(1), 309(j)(3), and 309(j)(6)(E); (3) violated 47 U.S.C. § 157 by, *inter alia*, wrongly concluding that M2Z is not offering a "new technology or service," failing to place on the opponents of M2Z's proposal the burden of

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<sup>17</sup> NPRM ¶ 3, note 4.

<sup>18</sup> *AT&T v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006). *See also AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001); *Verizon Telephone Companies v. FCC*, 374 F.3d 1229 (D.C. Cir. 2004).

demonstrating that the proposal is not in the public interest, and failing to make a public interest determination within one year; and (4) violated 47 U.S.C. § 307 by, *inter alia*, failing to determine whether issuing M2Z a license would serve the public convenience, interest, or necessity. Notably, under Section 307, when the public convenience, interest, or necessity is met (as it was here) the Communications Act provides the Commission with no discretion concerning license assignment: “[t]he Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, *shall grant* to any applicant therefor a station license provided for by this chapter.”<sup>19</sup> Section 309(a) similarly provides that the Commission “shall grant” an application where the “public interest, convenience, and necessity would be served.”<sup>20</sup> Instead of performing the statutorily-mandated analysis, the Commission relies on a preference for rulemaking arguing that it has been past practice to do so. However, this assertion is contrary to the hundreds of thousands of assignment decisions made by the Agency each year in which it approves license applications and mutual exclusivity is not triggered.<sup>21</sup> Worse still, the Commission’s NPRM (which could have been issued and resolved while M2Z’s application and petition were pending) was delayed after the statutory deadlines for action here.

M2Z is likely to succeed on one or more of these claims. However, even if the Commission disagrees with that assessment, it should still impose the requested stay. Where serious and irreparable harms lurk absent a stay, a litigant is entitled to that stay so long as he can show that “serious questions are raised” in the appeal. *Washington Metro. Area Transit*, 559 F.2d at 844.

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<sup>19</sup> See 47 U.S.C. § 307(a) (emphasis added).

<sup>20</sup> See 47 U.S.C. § 309(a).

<sup>21</sup> The Commission processes more than 600,000 applications for wireless service per year by accepting the applications for filing, providing public notice of such acceptance, and making a public interest determination to grant or deny. See 2006 Wireless Telecommunications Bureau Presentation at January 20, 2006, Open Commission Meeting, at page 5, available at <http://www.fcc.gov/realaudio/presentations/2006/012006/wtb.pdf>. As the Bureau’s Presentation notes, more than 220,000 of these applications were for new licenses, renewals or special temporary authority. See also M2Z Consolidated Opposition to Petitions to Deny at 75-84, WT Dockets 07-16 & 07-30 (filed Mar. 29, 2007).

M2Z is at risk of one of the more serious harms imaginable – irrevocable loss of its statutory right of appeal – and its appeal at the very least raises the requisite “serious questions.” The stay should be entered.

3. *Prejudice to Others.* This factor militates in favor of a stay because no party will be prejudiced if M2Z’s request is granted. M2Z seeks only that the Commission stay the *outcome* of the NPRM pending the resolution of M2Z’s D.C. Circuit appeal. That means the Commission would be free to continue to receive and process comments in the ordinary course; it would simply refrain from issuing any rules, orders, or other form of binding administrative rules or guidance until the resolution of M2Z’s appeal. In the short term, then, no party would be adversely affected; in the longer term, adverse impacts would be arguable only if M2Z’s appeal is still pending when the Commission is ready to promulgate rules in this docket. And the chance of that speculative harm will be greatly reduced if the Commission joins M2Z in asking the D.C. Circuit to expedite the appeal. *See infra* at 12.

4. *Public Interest.* The public interest factor likewise favors a stay. First, it is in the public interest to afford litigants their day in court. Second, a proper consideration of M2Z’s license request is in the public interest because M2Z’s successful application will result in nearly ubiquitous broadband access within ten years of a license grant and commencement of operations. Third, M2Z’s proposal will utilize heretofore mostly fallow and unproductive spectrum to deliver free broadband access<sup>22</sup> to underserved areas and populations as well as urban areas, helping to bridge the digital divide.<sup>23</sup> Fourth, the proposal will stimulate further innovation and competition in

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<sup>22</sup> M2Z consumers will not incur monthly fees unless they subscribe to additional services.

<sup>23</sup> *See, e.g.*, Comments of the Rev. Jesse L. Jackson of the Rainbow PUSH Coalition, WT Docket 07-16, at 2 (submitted Sept. 7, 2007) (noting that M2Z’s promise “to help correct the economic inequities that exist with broadband access and Internet use in general” aligns with the FCC’s “moral obligation to promote justice and equality by extending the critical opportunities of the information age to all Americans”); Comments of the Association of Community Organizations for Reform Now, WT Docket 07-16, at 1-2 (submitted Feb. 2, 2007) (noting that current

the broadband marketplace that will directly benefit consumers.<sup>24</sup> Fifth, M2Z will facilitate and supplement a nationwide interoperable public safety data broadband network.<sup>25</sup> Sixth, M2Z will not utilize any public monies during the course of the build out which could save at least \$8.4 billion and up to \$20.5 billion of taxpayer dollars because the proposal will obviate the expansion of the Universal Service Fund.<sup>26</sup> Indeed, the build out and deployment of M2Z's network will increase consumer welfare by 18-32.4 billion dollars.<sup>27</sup> Seventh, M2Z will voluntarily filter access to indecent materials, protecting children from objectionable online content.<sup>28</sup> Eighth, grant of M2Z's application would enhance educational opportunities for all students.<sup>29</sup> Ninth, the proposal would

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providers "are only interested in serving Americans that can afford high monthly subscription rates," while in contrast, M2Z's proposed service would reach low- and middle-income citizens *and* provide a more affordable option); Comments of One Economy Corporation, WT Docket 07-16, at 2 (submitted Mar. 1, 2007) ("[T]his type of market innovation will further One Economy's mission, benefit an underserved portion of our country, and serve the public interest."); Latino Coalition Comments at 2 (submitted Mar. 22, 2007) ("M2Z Networks offers a legitimate opportunity to shrink the digital divide and provide real opportunities for the Latino community to take advantage of the incredible educational and economic development opportunities available on the Internet and to develop skills and compete for jobs in the information economy.").

<sup>24</sup> See, e.g., Comments of The Electronic Retailing Association, WT Dockets 07-16 and 07-30, at 2 (submitted Feb. 26, 2007) ("ERA Comments") (noting that "competition at the network level is extremely important" in order to ensure that providers will not deny access to any consumer).

<sup>25</sup> See, e.g., Comments of the National Troopers Coalition, WT Docket 07-16, at 1 (submitted Feb. 6, 2007) ("M2Z's proposed networks will provide another layer of redundancy to bolster existing and planned public safety-operated networks and help law enforcement stay operational in disasters.").

<sup>26</sup> See *M2Z Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band*, (as amended, September 1, 2006), at 3. Additionally, M2Z will provide 5% of revenues generated from "premium" subscription services to the U.S. Treasury.

<sup>27</sup> Simon Wilkie, Executive Director, Center for Communication Law and Policy University of Southern California "The Consumer Welfare Impact Of M2Z Networks Inc.'s Wireless Broadband Proposal," WT Dockets 07-16 & 07-30 at 3 (filed Mar 1, 2007); Kostas Liopiros, "The Value of Public Interest Commitments and the Cost of Delay to American Consumers" WT Dockets 07-16 & 07-30 at 11-29 (filed Mar. 19, 2007).

<sup>28</sup> See, e.g., Comments of Mr. Tony Perkins of the Family Research Council, WT Dockets 07-16 and 07-30, at 1 (submitted Aug. 30, 2007) (supporting M2Z's proposed service as a way to serve the public interest in preventing "the delivery of obscenity through telecommunications devices and electronic media."); Comments of United Families International, WT Dockets 07-16 and 07-30, at 1-2 (submitted Mar. 16, 2007) (supporting access to "clean" wireless broadband for American families); Comments of Internet Keep Safe Coalition, WT Docket 07-16, at 2 (submitted Mar. 1, 2007) (expressing approval of M2Z's network-level filtering of indecent and pornographic material); Comments of Enough is Enough, WT Dockets 07-16 and 07-30, at 1 (submitted Mar. 13, 2007) ("By making a commitment to use highly effective network based filtering, M2Z has found an innovative balance between spurring the rapid adoption of high speed internet service and protecting children and families from on line pornography and sexual predators.").

help bolster the competitiveness of small and independent businesses across the nation.<sup>30</sup> Finally, M2Z's application adheres to and advances the principles underlying Title 47 U.S.C. § 151 and Section 706 of the Telecommunications Act of 1996 which provides that the "Commission...shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."<sup>31</sup> If the D.C. Circuit is not afforded the opportunity to consider M2Z's legal arguments, and to order the Commission to give proper consideration to M2Z's licensure application, M2Z will lose its lone opportunity to see that these benefits receive due consideration.

**B. In Addition To Granting The Requested Stay, The Commission Should Join M2Z In Requesting Expedited Handling Of M2Z's Pending Appeal.**

Finally, as noted above, M2Z respectfully requests that in addition to issuing the requested stay -- and even if it declines to issue the requested stay -- the Commission join M2Z in requesting expedition of M2Z's pending appeal before the D.C. Circuit. Expedited handling of the case would obviate any risk of prejudice to other interested parties during the course of the stay. It also would

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<sup>29</sup> See, e.g., Comments of Educause, WT Docket 07-16, at 1 (submitted Feb. 28, 2007) ("Ubiquitous broadband Internet access would empower teachers and promote student success by taking the educational experience beyond the walls of the classroom."); Comments of the National PTA, WT Docket 07-16, at 2 (submitted Mar. 1, 2007) (asserting that M2Z's proposal is an "innovative and equitable way to ensure that broadband is an educational resource available to all Americans -- parents, children and educators"); Comments of the Higher Education Wireless Access Consortium, WT Docket 07-16, at 1 (submitted Feb. 28, 2007) (supporting M2Z's proposal as a way to help bridge the gap between those schools with wireless connectivity and those with fewer resources); Comments of the League for Innovation in the Community College, WT Docket 07-26, at 1 (submitted Feb. 28, 2007) (reporting that while computer and Internet access has increased, there still remains a substantial information divide between those communities that do and "communities that do not have adequate access to the Internet and technology-based training, resources, and services"); Comments of the College Parents of America, WT Docket 07-16, at 1 (submitted Feb. 28, 2007) (indicating that with the rising cost of college, free broadband service would provide great financial relief to struggling parents and would allow more students to participate in distance learning programs).

<sup>30</sup> See, e.g., Comments of the California Association for Local Economic Development, WT Docket 07-16, at 2-3 (submitted Feb. 14, 2007) (noting that widespread governmental interest in deploying broadband stems from recognition that broadband access fosters economic development and that M2Z's innovative proposal will help government expand broadband access using private funds); Amicus Curiae Comments of the Minority Media and Telecommunications Council, WT Docket 07-16, at 10-11 (submitted Mar. 2, 2007) (noting that the Internet is crucial to the success of all small and independent businesses, which account for over 99% of all companies, and asserting that "a free, nationwide broadband Internet access service would extend the potential of e-commerce to all businesses."); ERA Comments at 1-2 (submitted Feb. 6, 2007) (noting that connection to the Internet makes available to online entrepreneurs the ability to market directly to the end-consumer in an affordable and direct way).

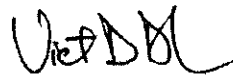
<sup>31</sup> See 47 U.S.C. § 157 nt. Pub L. No. 104-104, § 706(a), 110 Stat. 153 (1996).

make it much more likely, even in the absence of a stay, that the D.C. Circuit is able to render a decision on the important questions presented by M2Z before M2Z's appeal is potentially obviated by subsequent Commission action. M2Z does not wish to unnecessarily delay the NPRM proceedings. Indeed, the Commission could have prevented the current conflict between the pending appeal and the recently announced NPRM through timely action here. Instead of moving quickly on all fronts, the Commission decided to initiate a rulemaking after the statutory deadlines for its review of M2Z's Application and forbearance petition expired. However, and as noted above, the Commission has the opportunity to enable the D.C. Circuit to reach a decision on the merits of M2Z's appeal without prejudicing third parties. Moreover, the Commission had an obligation—that it did not meet—pursuant to 47 U.S.C. §§ 157 and 160 to rapidly review, and rule on the substantive merits of, M2Z's application and forbearance petition. M2Z's utilization of these provisions highlights M2Z's commitment to the prompt resolution of this matter, a commitment that it once again respectfully requests the Commission to share. Expedition of the appeal has the additional benefit of preserving the Commission's resources with respect to the NPRM should the D.C. Circuit rule in M2Z's favor.

### III. CONCLUSION

For the foregoing reasons, M2Z respectfully requests that the Commission (1) stay the outcome of the above-captioned rulemaking pending the D.C. Circuit's resolution of M2Z's pending appeal and (2) join M2Z in asking the D.C. Circuit to expedite the pending appeal.

Respectfully submitted,



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## **CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that on this 26th day of September, 2007, a true copy of the foregoing Motion to Stay Outcome of NPRM Pending M2Z's Administrative Appeal was sent by first-class mail to each of the following:

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